
OPINION OF THE PUBLIC ACCESS COUNSELOR

BARRON E. BARNETT,
Complainant,

v.

OWEN COUNTY EMERGENCY MGMT. DEPT.,
Respondent.

Formal Complaint No.
18-FC-147

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Owen County Emergency Management Department violated the Access to Public Records Act.¹ County Attorney Eric D. Somheil filed an answer to the complaint on behalf of the Department. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to

¹ Ind. Code §§ 5-14-3-1, to -10

the formal complaint received by the Office of the Public Access Counselor on December 19, 2018.

BACKGROUND

This case is about whether the Owen County Emergency Management Department has discretion under the Access to Public Records Act to withhold the county's Comprehensive Emergency Management Plan ("CEMP") from disclosure.

Barron E. Barnett ("Complainant") contends he requested a copy of the Owen County CEMP from EMA Director Jack White at the meeting of the Owen County Local Emergency Planning Committee and the Emergency Management Advisory Council on September 12, 2018.

Barnett asserts that White denied his request for a copy of the CEMP because the plan includes personal phone numbers for certain officials. Barnett concedes that White invited him to inspect plan at the office. Additionally, Barnett says the meeting concluded with the EMAC voting to refuse to provide copies of the plan to the public.

Over the next couple months Barnett called and sent letters to other public agencies, including the Governor's Office and the Indiana Department of Homeland Security, protesting the denial of access to the CEMP. As a result, IDHS referred Barnett to this Office.

Barnett filed a formal complaint with this Office on December 19, 2018.

On January 23, 2019, in response to the formal complaint, the County attorney submitted a one paragraph argument

contending the CEMP is excepted from disclosure in accordance with Indiana Code Sections 5-14-3-4(b)(10) and (b)(19). Additionally, Owen County asserts such non-disclosure is authorized by APRA based upon “jeopardizing of security systems and/or the reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack.”

ANALYSIS

The primary issue in this case is whether Owen County has discretion under the Access to Public Records Act to withhold from disclosure the Comprehensive Emergency Management Plan requested by Barnett.

1. The Access to Public Records Act (“APRA”)

APRA expressly states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1.

The Owen County Emergency Management Department (“Department”) is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). That means unless an exception applies, any person has the right to inspect and copy the Department’s public records during regular business hours. Ind. Code § 5-14-3-3(a). A request for inspection or copying must identify with reasonable particularity the record being requested. Ind. Code § 5-14-3-3(a)(1).

APRA has both mandatory and discretionary exemptions to the disclosure of public records. *See* Ind. Code §§ 5-14-3-4(a),

(b). One category of records that may be withheld from disclosure at the discretion of the agency are those records categorized as administrative or technical information that would jeopardize a record keeping or security system and records that, if release, may expose a public agency to the vulnerability of a terrorist attack. *See* Ind. Code §§ 5-14-3-4(b)(10), and (19).

These exceptions to disclosure are at the heart of this case.

2. Sensitivity of Emergency Management Plans

Owen County maintains that it has discretion to withhold the Comprehensive Emergency Management Plan because it qualifies under APRA's disclosure exception for sensitive material.

Under APRA, materials that, if released, would jeopardize a technical or security system may be withheld at the discretion of the public agency pursuant to Indiana Code Section 5-14-3-4(b)(10). Typically these types of information qualify as computer codes, usernames, passwords, server locations, cybersecurity assessments and plans, encryption processes, log-ins, protocols, and the like. While some of this information may indeed be contained in an emergency management plan, certainly the entirety of the plan is not as sensitive.

Similarly, other vulnerability assessment documentation can be withheld as sensitive under Indiana Code Section 5-14-3-4(b)(19), which provides a public agency discretion to withhold the following:

A record or a part of a record, the public disclosure of which would have a reasonable likelihood

of threatening public safety by exposing a vulnerability to terrorist attack.

The remainder of this subsection lists the types of records that would qualify such as: agricultural terrorism prevention records, threat assessments, risk planning, preparedness strategies, critical infrastructure security records, etc.

Again, these considerations may be documented in parts of a CEMP. While certain aspects of emergency preparedness deals with protecting the public from bad actors, it's also about educating the public as to what to do when faced with natural disasters, how to contact emergency personnel, and how to keep their families safe.

Barnett's combative correspondence notwithstanding, he's right that emergency planning is for the public and should be reasonably transparent.

The County appears to be somewhat dismissive of this and does not devote much energy into justifying its actions. But no one is suggesting that the County create a liability by release those parts of the document that would place the public at risk. On the contrary, some counties and political subdivisions have put some or all of their preparedness plans online for the public's benefit.

Fortunately, the law contemplates the separation of sensitive material from the disclosable in Indiana Code Section 5-14-3-6(a), which provides:

If a public record contains disclosable and non-disclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying.

Here, the County withheld the record entirely. Without more, this Office is left to presume that Owen County's Comprehensive Emergency Management Plan is no different than other county's plans and can be released with sensitive portions withheld or redacted.

CONCLUSION

Based on the foregoing, it is the recommendation of the Public Access Counselor that the Owen County Emergency Management Advisory Council walk back its vote to withhold the entirety of the CEMP from public disclosure and release those portions that are not truly sensitive.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor